NO.

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Erratum

Petition for Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit

Ann C. Field, et al., Petitioners

v.

Commissioner of Internal Revenue, Respondent

Insert the following paragraph at the end of page 17 of the printed Petition.

"The Government's position is also clearly contrary to the method for commencement of a proceeding provided for by the Internal Revenue Code. The 30-day letter is simply an administrative practice provided for by Internal Revenue Service procedures. It is subject to unilateral administrative change in form and purpose without legislative change. Clearly it should not be within the power of the Service alone to determine what form of notice it will issue to commence a proceeding in conflict with the one specific form of notice provided by statute, being the one form of notice from which appeal may be taken to a court; yet this would be the effect of respondent's position that the 30-day letter constitutes the commencement of a proceeding."

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5. Section 6212. ***

(a) *** If the Secretary or his delegate determines that there is a deficiency in respect of *** tax *** he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ANN C. FIELD, Transferee of Adwood Corporation,
No. 14,077,
HARRY GOLD, Transferee of Adwood Corporation
No. 14,078,
HAL D. CANTIN, Transferee of Adwood Corporation,
No. 14,079,
MAX DANIELS, Deceased, Ethel Daniels,
Sole Heir at Law,
No. 14,080,
SAMUEL J. BASKIN, Transferee of Adwood Corporation,
No. 14,081,
IRVING BILTON, Transferee of Adwood Corporation,
No. 14,082,
ETHEL DANIELS, Transferee of Assets of the Estate of
Max Daniels, Transferee of Adwood Corporation,
No. 14,083

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cases on December 19, 1960, affirming a decision of the Tax Court of the United States, published in 32 T.C. 187 (1959). Petition for Rehearing was denied on January 31, 1961.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Was a "proceeding" within the meaning of Section 75 of the General Corporation Law of the State of Michigan commenced against Adwood Corporation by the issuance of 30-day letters by the Internal Revenue Service to Adwood prior to the date of its dissolution so as to extend the life of Adwood beyond the three-year statutory period after dissolution, for the purpose of determining the timely issuance of notices of deficiency to petitioners as transferees from Adwood?

II

Did the Court of Appeals err in failing to remand these cases to the Tax Court to rule on whether or not the Commissioner had exhausted his remedies against Adwood, the transferor, before proceeding against the petitioners as transferees?

III

Did the Court of Appeals err in failing to remand for proper consideration by the Tax Court of the appropriate method for computing any liability for interest on the deficiencies in tax asserted against petitioners as transferees?

STATEMENT OF THE CASE

Petitioners are all transferees of Adwood Corporation, a Michigan corporation.*

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* Except Ethel Daniels who is a transferee of the transferee Max Daniels.

On April 28, 1951, Adwood distributed all of its assets to petitioners in dissolution and liquidation after filing an appropriate form of Certificate of Dissolution with the Michigan Corporation and Securities Commission and Form 966 with the Commissioner of Internal Revenue.

On November 5, 1952, Consents (Form 872) purporting to extend the period of limitations for assessment of taxes against Adwood were last executed on behalf of the corporation with respect to its taxable years ending May 31, 1945-1950, both inclusive, extending the period for assessment to June 30, 1954.

On October 23, 1953, Waivers (Form 870) authorizing assessment against and collection of deficiencies from Adwood were executed for all of the aforesaid years, and except for excess profits taxes for the year ended May 31, 1945, and declared value excess profits taxes for the year ended May 31, 1946, all of the deficiencies asserted were duly assessed on December 11, 1953.

Notices of transferee liability were mailed to the petitioners on June 23, 1955, except Ethel Daniels, transferee of a transferee, to whom notice was mailed on December 5, 1955.

An offer in compromise on Treasury Form 656 on behalf of Adwood seeking to compromise the assessed liability for taxes of $118,690.92 was filed with the District Director at Detroit, Michigan, on January 13, 1954. A check in the amount of $50,295.29 was submitted with the offer. This offer was never accepted or rejected; nevertheless the funds were held by the Commissioner until after the Tax Court rendered its decision in these cases after which the offer was withdrawn.

The Tax Court on April 24, 1959, held that the statutory notices of transferee liability were timely and that assess-

ment and collection of the taxes involved are not barred by the statute of limitations.

On July 28, 1959, the Tax Court entered its decisions finding petitioners herein liable as transferees for deficiencies due from Adwood.

On July 30, 1959, and August 3, 1959, the petitioners paid the total tax liability of $118,690.92 which the Tax Court found to be due from them as transferees.

On October 19, 1959, the petitioners filed a petition for review of the Tax Court's decisions by the United States Circuit Court of Appeals for the Sixth Circuit but did not file a bond for payment of the unpaid interest on the aforesaid additional taxes.

On or about November 17, 1959, the Commissioner assessed interest on the aforesaid tax liability, and on February 9, 1960, after receipt of notice and demand the petitioners paid in full all interest demanded by the Commissioner in the aggregate amount of $90,012.11.

The following is a schedule of the taxes and interest paid by petitioners.

Year Involved	Kind of Tax	Additional Tax Paid	Interest Paid
May 31, 1945	Excess Profits	$ 34,927.76	$ 29,605.81
May 31, 1946	Declared Value Excess Profits and Income	7,490.46	5,894.48
May 31, 1946	Excess Profits	26,326.78	20,716.59
May 31, 1947	Income	20,110.47	14,617.08
May 31, 1948	Income	20,109.04	13,394.85
May 31, 1949	Income	7,999.25	4,842.61
May 31, 1950	Income	1,727.16	940.69
		$118,690.92	$ 90,012.11

For each year the amount of interest demanded and paid represents interest at 6% per annum from the date the return was due (August 15th in each year) to the date of payment of the tax, plus interest on such interest from November 27, 1959 (ten days after assessment) to February 9, 1960.

On December 19, 1960, the Court of Appeals for the Sixth Circuit affirmed the Tax Court without opinion. Petition for Rehearing was denied on January 31, 1961.

Petitioners urge that the notices of deficiency sent to them as transferees on June 23, 1955, were not timely issued because they were not issued within one year following the expiration of the period for assessment of additional deficiencies against Adwood, the transferor.

Whether the notices of deficiencies were issued before such one year expired depends on whether the corporate life of Adwood for purposes of assessment of any additional deficiencies against Adwood terminated under Michigan law on April 27, 1954, or June 30, 1954.

Petitioners contend that under Michigan law when a corporation dissolves there is by reason of the Michigan statute an extended three-year life for the purpose of winding up, but that at the end of the statutory three-year life, the corporate life is terminated for all purposes, except as otherwise specifically provided by the statute, in this case with respect to any action, suit or proceeding begun or commenced by or against Adwood prior to its dissolution. Petitioners urge that no action, suit or proceeding within the meaning of the Michigan statute was commenced either by or against Adwood prior to its dissolution and that its life, therefore, terminated three years after dissolution or on April 27, 1954, more than one year before the issuance of the notices of deficiency to petitioners as transferees.

Petitioners further contend that the Commissioner cannot legally proceed against transferees until after he has exhausted his remedies against the transferor. In the instant circumstances, petitioners believe that it is clear from the Findings of Fact and Opinion of the Tax Court that such remedies were not exhausted since the Commissioner failed to act in any manner with respect to the bona fide offer in compromise submitted on behalf of Adwood together with the sum of $50,295.29.

Lastly, petitioners contend that in any event the decisions of the Tax Court embodying a determination with respect to interest due from petitioners as transferees with respect to the deficiencies of Adwood are in error and that the Court of Appeals erred in failing to remand these cases to the Tax Court for reconsideration of the "interest" questions.

REASONS FOR GRANTING THE WRIT

I

Was a "Proceeding" Within the Meaning of Section 75 of the General Corporation Law of the State of Michigan Commenced Against Adwood Corporation by the Issuance of 30-Day Letters by the Internal Revenue Service to Adwood Prior to the Date of its Dissolution so as to Extend the Life of Adwood Beyond the Three-Year Statutory Period After Dissolution, for the Purpose of Determining the Timely Issuance of Notices of Deficiency to Petitioners as Transferees from Adwood?

1. The Tax Court holding with respect to this question, affirmed without opinion by the Court of Appeals for the Sixth Circuit, is contrary to the rule of law expressed by the Courts of Appeals for the Fourth and Second Circuits in *Bahen and Wright, Inc.* v. *Commissioner*, 176 F. 2d 538 (4th Cir. 1949) and *American Standard Watch Co., Inc.* v. *Commissioner*, 229 F. 2d 267 (2d Cir. 1955).

2. The decisions of the Sixth Circuit and the Tax Court in these cases fail to properly apply the rule of this Court in *Commissioner* v. *Stern*, 357 U.S. 39 (1958), and are contrary to the obvious meaning of the applicable Michigan statute.

3. The decisions of the Tax Court in these cases, rendered without review by the whole court, are contrary to its own decisions *both prior to* and *subsequent to* its decisions in these particular cases.

4. The question presented is an important issue of law, since state law must be applied to facts and events arising out of a federal matter, and the issue should be resolved by this Court before the erroneous rule of the Tax Court and the Sixth Circuit is extended to its logical conclusion with the necessary effect of making totally meaningless pertinent state statutes applicable to determine transferee liability.

II

Did the Court of Appeals Err in Failing to Remand these cases to the Tax Court to Rule on Whether or Not the Commissioner had Exhausted his Remedies Against Adwood, the Transferor, Before Proceeding Against the Petitioners as Transferees?

1. Both the Tax Court and the Court of Appeals failed to consider a legal issue which could be dispositive of these cases and which it is generally accepted must be resolved as a matter of law in all transferee liability cases. Both the Tax Court and the Court of Appeals so failed despite the fact that the issue was clearly implicit in the facts as found by the Tax Court and was specifically raised by petitioners by timely motions.

2. The Tax Court erred in failing to consider petitioners motions timely and to address itself specifically to the aforementioned issue.

3. The Court of Appeals erred in failing to remand to the Tax Court to consider this issue.

4. Regardless of the factual question as to whether or not in the particular circumstances of these cases the Commissioner had in fact exhausted his remedies, the view of the petitioners that the question of exhaustion of remedies was not considered by the Tax Court or the Court of Appeals and must be considered as a legal issue in all transferee liability cases, presents to this Court an important question of federal law which must be resolved. The action of the Tax Court and the Court of Appeals in and of itself, raises this issue for resolution by this Court as the only authority competent to resolve the question.

III

Did the Court of Appeals Err in Failing to Remand For Proper Consideration by the Tax Court of the Appropriate Method for Computing any Liability for Interest on the Deficiencies in Tax Asserted Against Petitioners as Transferees?

1. The decisions of the Tax Court and the Court of Appeals affirming the Tax Court are contrary to proper application of the decision of this Court in *Commissioner* v. *Stern, supra,* and the applicable statutory provisions governing the liabilit of transferees for interest on deficiencies of the transferor.

2. The decision of the Tax Court affirmed by the Court of Appeals, determining the liability of the transferees for interest, is in conflict with the rule of the Tenth Circuit in *Voss* v. *Wiseman,* 234 F. 2d 237 (10th Cir. 1956).

3. The interest liability questions are important since they must be resolved to avoid additional litigation. The only further means open to petitioners to resolve these questions is to sue in a separate proceeding for refund of

the interest petitioners claim has been illegally collected. Petitioners should not be put in such a position, nor subjected to the cost and delay of more litigation, where in this proceeding proper jurisdiction exists to consider questions of interest liability and such questions were timely raised.

ARGUMENT

I

The basic issue in these cases is whether, for the purposes of Section 276(b)[1] and Section 311(b)[2] of the Inter-

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[1] Sec. 276. • • •

(b) Waiver. — Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

[2] Sec. 311. • • •

(b) Period of Limitation. — The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer, — within one year after the expiration of the period of limitation for assessment against the taxpayer;

(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—

except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively, — then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.

(3) In the case of the liability of a fiduciary, — not later than one year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later;

(4) Where before the expiration of the time prescribed in paragraph (1), (2) or (3) for the assessment of the liability, both the Commissioner and the transferee or fiduciary have consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

nal Revenue Code, the period of limitations for assessment of tax deficiencies against Adwood Corporation was extended to April 27, 1954, or June 30, 1954, and the resolution of that question depends upon whether, under Section 75 of the Michigan corporation law, the corporate existence of Adwood extended beyond the primary three-year period allowed because of a proceeding commenced by or against Adwood prior to its dissolution.[3]

The applicable Michigan statute (Corporation Law Section 21.75 Mich. Stat. Ann.) provides:

> "All corporations whose charters shall have expired by limitation or dissolution, or shall be annulled by forfeiture or in any other way or manner have become void, shall nevertheless continue to be bodies corporate for the further term of three (3) years from such expiration, dissolution or forfeiture for the purpose of prosecuting and defending suits for or against them, and of enabling them gradually to settle and close their affairs and to dispose of and convey their property and to divide their assets: ***Provided, that with respect to any action, suit or proceeding begun or commenced by or against the corporation prior to such expiration, dissolution or forfeiture and with respect to any action, suit or proceeding begun or commenced by the corporation within three (3) years after the date of such expiration, dissolution or forfeiture, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued a body corporate beyond said three (3) year period and until any judgments, order or decrees therein shall be fully executed.***".

Clearly the life of Adwood could not be extended under

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[3] The question of whether or not the existence of Adwood could be extended beyond the statutory three-year period must be answered by reference to state law. *Commissioner v. Stern, supra.*

Michigan law *for any purpose* beyond three years after its dissolution on April 27, 1951, unless:

(1) an action, suit or proceeding was begun *by* or *against* Adwood *prior to dissolution;* or

(2) an action, suit or proceeding was begun *by* Adwood within three years *after dissolution;*

and then such extension of corporate life could be only with respect to the particular action, suit or proceeding so begun, until a judgment, order or decree were rendered therein and executed.

The Government has not urged that Adwood began a proceeding by any act of its own within the three year period after its dissolution. And it would be useless for the Government to have urged that a proceeding was begun against Adwood within the three years after dissolution since in such event the proceeding would under Michigan law have had to be completed and terminated within such three years, or by April 27, 1954, or it would abate.[4]

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[4] At common law, a corporation's capacity to sue or be sued terminates upon dissolution. In re *Booth's Drug Store, Inc.* 19 F. Supp. 95 (W.D.Va., 1937). After dissolution, no actions at law can be maintained by or against the corporation. *State of Missouri ex rel. Darr* v. *A. B. Collins & Co.,* 34 F. Supp. 550 (W.D. Mo., 1940). For this reason there are in most states statutes, such as Michigan's, which provide for the instigation and carrying on of litigation by and against a corporation after dissolution (*Fletcher, op. cit. supra,* §8143). "The three years' grace is for the purpose of orderly winding up corporate affairs, analogous to administration of the estate of a decedent. *Grand Rapids Trust Co.* v. *Carpenter,* 229 Michigan 582, 587, 201 N. W. 382; *Grand Rapids Co.* v. *Haney School Furniture Co.,* 221 Mich. 487, 489, 191 N. W. 196, A. L. R. 1020; *Dodge* v. *Barker,* 231 Mich. 577, 579, 204 N. W. 802. The legislature has power to enlarge the period of grace and it has done so in Section 75 as to suits or court proceedings commenced by the corporation at any time before the end of the three-year period, and as to suits or court proceedings commenced against the corporation before dissolution. For the purpose of such suits or proceedings only, corporate existence is now extended beyond the three year period and until resulting judgments, order or decrees are fully executed. *Wilgus and Hamilton, Michigan Corporation Law,* p. 403 (2d ed., 1950).

The Government's contention and the holding of the Tax Court affirmed by the Sixth Circuit is that a *proceeding* was begun *by* or *against* Adwood *prior to its dissolution.*

What is a "proceeding" within the meaning of the Michigan Statute? Petitioners submit that "proceeding" in this regard does not embrace a mere administrative process but can embrace only those courses of events and circumstances which necessarily and inevitably lead to or are part of a judicial or quasi-judicial hearing and procedure.

A "proceeding" is a "suit" or "judicial action" involving rights of persons or property, and includes the course of steps or measures taken in the prosecution of actions at law. *Jackson* v. *Jackson*, 14 N. E. 2d 276, 278, 279, 294 Ill. App. 508. A disputed matter does not become a "case" or "proceeding" *until the law provides for a hearing before a court. State ex. rel. O'Neil* v. *Hall*, 57 Ariz. 63, 110 P. 2d, 960, 963. The term "proceeding" in common general usage means a prescribed course of action for enforcing legal rights and remedies according to the regular course of *judicial* procedure. *Tifin Bldg. Corp.* v. *Balaban & Katz Corp.*, 87 F. Supp. 121, 123 (D.C., Ill. 1949).

That nothing, no events and no circumstances, of a lesser character constitute a "proceeding" under the Michigan Statute is apparent from the language of the statute itself where it is stated that corporate life continues "for the purpose of prosecuting and defending suits for or against" the corporation, and the language which permits the continuance of corporate life in case of a "proceeding" timely begun until, but only for the purpose of permitting the entering and execution of a *judgment, order* or *decree* with respect to the particular "proceeding." The character and the quality of the act or event which may constitute the

commencement of a proceeding under Michigan law, therefore, is clearly limited to such a particular event as *must* initiate a judicial or quasi-judicial hearing and procedure and which *must* result in a judgment, order or decree, for a *judgment, order* or *decree* can be entered only in a judicial or quasi-judicial hearing. The Michigan statute does not contemplate within the scope of a "proceeding" anything representing merely an administrative process prior and preliminary to the issuance of some form of notice or an act which properly initiates the judicial and quasi-judicial hearing and procedure which will and must in its normal course result in a judgment, order or decree.

The Government and the Tax Court consider that the issuance of a 30-day letter by the Internal Revenue Service to Adwood prior to the date of its dissolution constituted the commencement of a proceeding against Adwood under Michigan law. Petitioners submit that the 30-day letter issued by the Internal Revenue Service does not meet these requirements and is merely a part of an administrative process which may, but does not necessarily, lead up to an act or event fairly constituting the initiation of a proceeding; the 30-day letter is not itself the initiation of a proceeding within the meaning of the Michigan statute, and the opposite conclusion of the Sixth Circuit in affirming the Tax Court is in error, and is in conflict with the rule of the Fourth and Second Circuits.

In *Baken and Wright, Inc.* v. *Commissioner*, 176 F. 2d 535 (4th Cir. 1949) taxpayer was a Delaware corporation which was dissolved on December 31, 1944. One day short of the expiration of the statutory three-year period of extended corporate life after taxpayer's date of dissolution, the Government issued a 90-day letter to taxpayer. The

taxpayer subsequently petitioned to the Tax Court for redetermination of the deficiency asserted by the Commissioner.

The Tax Court dismissed the petition on the ground that the taxpayer had ceased to exist under Delaware law. The Court of Appeals reversed and held that the petition was properly filed and that a proceeding had been begun against the taxpayer-corporation by the issuance of the 90-day letter.

The Delaware statute involved is quite similar to the Michigan statute involved in the instant cases, except that under the Delaware statute a proceeding might be begun or commenced *against* a dissolved corporation within its three-year extended life after dissolution without abating at the end of such three-year period, whereas, under the Michigan statute a proceeding which is to survive beyond the statutory three-year period of extended corporate life must have been begun *against* the dissolved corporation prior to dissolution—only a proceeding begun *by* the dissolved corporation itself after dissolution but during the three-year extended life would not abate at the end of the extended three-year life provided by statute.

The Fourth Circuit held that the 90-day letter issued to taxpayer in *Bahen and Wright*, was the "first formal step in the assessment and collection of an additional tax without which payment of the tax cannot be enforced." The Court clearly considered that events which might occur in the course of the administrative process prior to issuance of the 90-day letter did not represent a sufficiently formal step to be regarded as instituting a proceeding within the scope of a state statute comparable to that involved in the instant cases. This is apparent from the fact that in *Bahen and Wright* there had been a series of con-

ferences between the Commissioner and those charged with winding up the affairs of the taxpayer-corporation prior to the issuance of the 90-day letter, and presumably there had also been issued appropriate forms of 10- and 30-day letters or other such comparable documents as then were issued under applicable Internal Revenue Bureau procedures. The Court position that the 90-day letter constituted the first step qualifying as commencement of a proceeding, clearly indicates that only at this point do the events potentially involved in a tax matter become more than merely one more step in the continuum of events representing the administrative process. As is evident from the facts, the issue involved in *Bahen and Wright* arose only because there is a legal distinction between events which may be part of the administrative process and events which are of such a quality that they lead necessarily to and are, therefore, the commencement of a "proceeding" in which an order, judgment or decree will ultimately issue from a judicial or quasi-judicial body.

In light of the foregoing, it is clear that *Bahen and Wright* is in direct conflict with the holding of the Sixth Circuit in affirming the Tax Court in the instant cases.

Bahen and Wright was followed in *American Standard Watch Co., Inc.* v. *Commissioner*, 229 F. 2d 672 (2d Cir. 1955) where the petitioner had, on February 17, 1954, filed a petition with the Tax Court appealing from a notice of disallowance under §722 mailed November 20, 1953. The corporation involved was dissolved on March 17, 1947, and claim for §722 relief was filed on August 11, 1948. The Tax Court granted the Commissioner's motion to dismiss. In reversing, the Circuit Court said there are three steps to obtaining §722 relief: (1) filing claim, (2) statutory notice of disallowance, and (3) appeal within ninety (90) days. The Commissioner argued that the filing of the Tax

Court petition constituted the commencement of a new proceeding distinct from the previous filing of the refund claim. The Circuit Court rejected this argument and held specifically that the filing of a refund claim cannot be separated from the filing of a Tax Court petition and that they are both parts of a "proceeding".

This case clearly supports petitioners. The relationship between the claim for refund under §722 and the filing of a petition in the Tax Court when the claim is rejected is exactly the same as that between the statutory notice (90-day letter) and the petition. The first step under either situation is a step necessarily involved in and headed towards court consideration and is something distinctly different from the issuance of a 30-day letter which is merely a statement of a proposal to take certain steps to *subsequently* initiate a proceeding.

In *Wheelers' Peachtree Pharmacy, Inc.*, 35 T. C. No. 22, the Tax Court itself subsequent to its decisions in the instant cases had this to say about the Fourth and Second Circuits rule.

> "Although the United States Court of Appeals for the Fourth Circuit, in *Baheu and Wright* v. *Commissioner, supra*, disagreed with this Court as to what constituted the beginning of an action, suit, or proceeding under the facts of that case, that court indicated that the issuance of the Commissioner's notice of deficiency was the first formal step in a 'proceeding' as used in the State statute there under consideration, to assess and collect additional taxes. Also see *American Stand. Watch. Co.* v. *Commissioner*, 229 F. 2d 672, 2d. Cir. 1956."

No statement could more clearly reflect the conflict between the Fourth and Second Circuits on the one hand and the Sixth Circuit on the other.

The correctness of petitioners' position is apparent from an understanding of the true character of the 30-day letter. This letter constitutes only a proposal by an agency of the United States, a proposal to which the taxpayer may or may not respond without necessarily being caught up thereafter in a judicial hearing and procedure. The issuance of the 30-day letter does not necessarily in the normal course, as is required by the Michigan statute, initiate a hearing and procedure which must result in a judgment, order or decree. Only the issuance of the 90-day letter is an event of this character.

The Government should not be permitted to ignore the fact that the 30-day letter is merely a statement of present thoughts—a proposal to assert a deficiency. If taxpayer files a protest thereto, the Internal Revenue Service function is to determine whether the proposal is right or wrong and decide whether a 90-day letter should issue. Any experienced practitioner can testify to the numerous instances in which the taxpayer's argument reflected in his protest is convincing to the Service and the 30-day letter proposal is reversed and no 90-day letter is issued. It must also be recognized as a matter of administrative practice that even if no protest is filed, while as a matter of course in normal circumstances a 90-day letter may well issue, the Service procedures are not so rigid as to preclude the possibility of not issuing the 90-day letter in a proper case where the personnel in charge of issuing 90-day letters might conclude that the 30-day letter proposal is in error.

If the 30-day letter is deemed to properly constitute commencement of a proceeding under Michigan law and this holding is not reversed, there is nothing to prevent extension of this rule to any contact between a taxpayer and the Government. Certainly then, the issuance of the so-called 10-day letter would also be the commencement of a

proceeding. The mere execution of Forms 872 extending the period of limitations for assessmenut could be the commencement of a proceeding. Even the mere advising by a revenue agent of a taxpayer by telephone, or in person, that the taxpayer's return is to be audited would be the commencement of a proceeding. But any such result would certainly be contrary to the intent of the Michigan legislature. In granting an extended period of time beyond the normal three-year waiting period it did so only on the supposition that the matter in dispute would, at least at the termination of the three-year winding-up period, if the action was brought by or against the corporation prior to dissolution or by the corporation after dissolution, be in the hands of a judicial body with supervisory power to force the matter to a timely conclusion.

Not only is the decision of the Sixth Circuit, affirming the Tax Court in these cases, in direct conflict with the rule expressed in *Baheu and Wright*, *supra*, and *American Standard Watch Co.*, *supra*, and contrary to the Michigan statute, but it conflicts also with its own decisions both before and after the decisions in these cases.

In *Grand Rapids Brass Co.*, 2 T. C. 1155 (1943), a Michigan corporation dissolved on June 30, 1942. A 90-day letter was mailed on June 23, 1943 during the three-year extended life period, and a petition in the Tax Court was filed September 17, 1943. The Commissioner's motion to dismiss was denied.[4]

But that is not all; in *Wheelers' Peachtree Pharmacy*, *supra*, the respondent was trying to establish that the execution and filing of consents extending the time for assessment constituted the initiation of a proceeding. Respondent cited the decision handed down in these cases by the Tax Court as authority. But the Tax Court stated:

"Respondent cites *Ann C. Field, supra.* We disagree with such argument. The filing of such consents does not constitute the commencement of any action, suit, or proceeding. The only purpose for such consents is to extend the time within which respondent can make an assessment. It is well known that such consents are frequently obtained by respondent simply because his representatives have not had time to audit the taxpayer's returns, and that often no additional tax is even proposed by respondent.

"Certainly the filing of a consent either prior to or during the 3 years after dissolution cannot be considered the beginning of a 'suit' by or against a corporation within the meaning of the Georgia statute cited above."

How much more preposterous it is to consider that a call from a revenue agent for examination of a taxpayer's return would be the commencement of a proceeding. Yet logic would force such a result if the 30-day letter or the 10-day letter are considered to constitute the commencement of a proceeding.

Petitioners contend that a 90-day letter only can be the first act properly constituting the commencement of a "proceeding", and, therefore, that in the instant case no proceeding was begun *by* or *against* Adwood *prior to dissolution* and since the issuance of the 90-day letter is not an act *by* the corporation, no proceeding was begun *by* Adwood during its three-year extended life. Accordingly, there is no basis under Michigan law for extending the life of Adwood beyond such three years and the notices to petitioners of transferee liability were not timely.

II

The Court of Appeals for the Sixth Circuit should have remanded these cases to the Tax Court to enter decisions

that petitioners are not liable as transferees on the ground that the Commissioner had not exhausted his remedies against the transferor, Adwood Corporation, before proceeding against the petitioners.

This issue was properly raised in the Tax Court by timely motions for leave to amend the petitions to conform to the proof, for reconsideration, and for review by the full Court. Any contention that petitioners' several motions before the Tax Court were not timely and that new issues were raised by petitioners which should not be considered in these cases is contrary to law and fact. This issue was clearly implicit in the very facts found by the Tax Court *and* represents a legal issue to be resolved in every case of transferee liability. In such circumstances it seems clear that the issue, while perhaps crystallized to a greater degree in petitioners' later motions, was clearly involved in the case from its inception and should have been considered by the Tax Court as a legal question properly presented on the record and by the facts before it. See, *Reo Motors, Inc.* v. *Comm.*, 219 F.2d 610 (6th Cir. 1955). See also *Estelle Want* v. *Commissioner*,—F.2d—(2nd Cir. 1960) where the Court discusses the Commissioner's contention that the petitioner was "precluded from raising the arguments against transferee liability on which she now relies most heavily, because of her alleged failure to assert them in the Tax Court." The Court there held that: "Petitioner's denials of the Commissioner's assertion of transferee liability were general enough to encompass any legal argument she might later choose to make."

There has been no showing that pursuit of Adwood, the transferor, would have been utterly futile. To the contrary, the record and the facts as found by the Tax Court clearly indicate the availability of substantial funds to the Commissioner for settlement of Adwood's liabilities fur-

nished on behalf of Adwood under a bona fide offer in compromise.

This Sixth Circuit was in error in failing to remand for proper consideration of the issue of exhaustion of remedies.

III.

The Court of Appeals for the Sixth Circuit has erred in failing to reverse the Tax Court decisions in so far as those decisions failed to exclude from the transferees' liability interest on deficiencies: (1) interest after November 23, 1953, thirty days after filing waiver of assessment (Form 870), to the date of assessment of the taxes in 1959 with respect to unpaid excess profits tax for the taxable year May 31, 1945, of $34,927.76, and declared value excess profits tax for the year May 31, 1946, of $2,027.93; and (2) for the period from date of distribution by Adwood to petitioners in 1951 to the date of determination and notice of transferee liability in 1955.

The Tax Court found that Adwood on October 23, 1953, duly executed and filed Waivers of Restrictions on Assessments and Collection of Deficiency in Tax and Acceptance of Over-Assessment (Forms 870) for the taxable years here involved; also that on December 11, 1953, the deficiencies were assessed except for the deficiencies in excess profits tax for the 1945 fiscal year and the declared value excess profits tax for the 1946 fiscal year.

Section 292 of the Internal Revenue Code of 1939 relating to interest on deficiencies provides as follows:

> "Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, *** and shall be collected as a part of the tax, at the rate of 6 per centum per annum, from the date prescribed for the payment of the tax *** to the date

the deficiency is assessed, or, in the case of a waiver under Section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier."

Section 272(d) of the Internal Revenue Code of 1939 provides as follows:

"The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

Under the above provisions of the statute because of the filing of the Form 870, no interest was due from Adwood Corporation on the aforesaid taxes aggregating $36,955.19 after November 23, 1953, thirty days after the waiver was filed. Cf. *United States* v. *Goldstein*, 189 F. 2d 752 (1st Cir. 1951).

Petitioners contend the liability of a transferee may not exceed the liability of his transferor. The transferee's liability is fixed by Section 311(a) of the Internal Revenue Code of 1939 at the tax, plus interest, imposed upon the taxpayer (transferor). Section 311 (a) of the 1939 Code provides:

"The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter:"

This Court in *Commissioner* v. *Stern*, *supra*, quoted from the Congressional reports with respect to the introduction into the statutory law the predecessor section of Section 311 as follows: "'Without in any way changing the extent of such liability of the transferee under existing law,***

[this section] enforces such liability*** in the same manner as liability for a tax deficiency is enforced;***". And in *Voss* v. *Wiseman*, 234 F. 2d 237 (10th Cir. 1956), the Court there said: "The statute does not require the transferee to respond in interest except that which is due from the transferor."

It clearly follows, therefore, that since Adwood, the transferor, was by statute relieved of liability for interest on the aforesaid deficiencies after November 23, 1953, the transferees are not liable for such interest; the Commissioner erred in collecting such interest from them, and the courts below erred in failing to consider and apply these accepted rules in computation of interest liability.

The petitioners also contend that they are not liable in respect of interest on the aforesaid taxes, for the period from the date of the distribution of the assets to the transferees to the date of issuance of the 90-day letters to the transferees. As stated above, certain of these taxes were, but others were not, assessed against the transferor, although the transferor on October 23, 1953, filed a waiver consenting to the assessment of such taxes. But there never was a final determination by the Commissioner and notice of liability to the transferees as is required, until the statutory notice or so-called 90-day letter provided for in Section 272 (a) of the Internal Revenue Code of 1939 was issued in 1955. No notice and demand for payment was ever served upon the transferor and neither was any notice and demand served upon the transferees prior to the issuance of the aforesaid 90-day letter.

Reference is made to the report of the Conference Committee on the 1926 Revenue Act, 69th Cong., 1st Sess., House Report No. 356, where it is stated that:

"Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of transfer of the assets. No further interest subsequently accrues upon such liability as assumed by the transferee, except the interest***for failure to pay upon notice and demand***."

In *Voss* v. *Wiseman, supra*, the court said:

"****There is no liability on the part of the transferee in law or in equity to pay the value of the assets until there has been a determination of the deficiency and notice thereof. 30 Am. Jur., Interest, §46. The transferee does not owe the tax deficiency and could not pay the value of the transferred assets until there had been a determination and notification of the taxpayer's deficiency***."

See also *Sims* v. *Patterson*, (D. C. Ala., 1959)—F. Supp. —60-2 USTC Par. 9,638 and *Want* v. *Commissioner* (C. A. 2d Cir. 1960)—F.2d—60-2 U.S.T.C. Par. 11,956 Cf. *Louisiana and Arkansas Railway Company* v. *Helvering*, 70 F. 2d 286 (D.C. 1934).

Under no circumstances, therefore, can the petitioners be liable for interest on the unassessed taxes until notice and determination of liability is made (which was not done until 1955). The results of the decision of the Sixth Circuit affirming the Tax Court is thus in clear conflict with the rule of the Tenth Circuit in *Voss* v. *Wiseman* and contrary to the applicable statutory rules.

That the Tax Court has jurisdiction over interest liability in cases of transferee liability is clear.

The Tax Court does not generally have jurisdiction over questions relating to the amount of a taxpayer's interest liability. In cases of transferee liability, how-

ever, the matter of interest liability is a proper matter over which the Tax Court has jurisdiction, *Henry Cappellini*, 16 B. T. A. 802(1929) *Coca-Cola Bottling Co.*, 22 B. T. A. 686(1930), *Wayne Body Corporation*, 24 B. T. A. 524 (1931), *Louisiana and Arkansas Railway Company* v. *Helvering*, *supra*, and in fact the Tax Court in this case so found that interest was due in specified amounts from each transferee.

Unless this Court remands for consideration on the merits of the "interest" questions, petitioners will be forced to carry on a separate proceeding. Petitioners should not be required to engage in unnecessary litigation where the matter can be resolved in a proceeding already in process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

David Altman
Gerald W. Brooks
Burton W. Kanter
209 South La Salle Street
Chicago 4, Illinois
Counsel for Petitioners

Altman, Levenfeld & Kanter
209 South La Salle Street
Chicago 4, Illinois
Of Counsel for Petitioners

APPENDIX A

JUDGMENT

December 19, 1960

The Petitions to review the decisions of the Tax Court of the United States in the above cases were heard on oral argument, briefs and the record.

Upon consideration.

IT IS ORDERED that said decisions be affirmed on the findings of fact and opinion of Judge Harron reported in 32 T.C. No. 17, and the orders entered subsequent thereto.

Approved for entry:

/s/ PAUL C. WEICK
United States Circuit Judge

ORDER DENYING REHEARING

January 31, 1961

Upon consideration,

IT IS ORDERED that Petition for Rehearing filed in the above cases be and it hereby is denied.

Approved for entry:

/s/ PAUL C. WEICK
United States Circuit Judge

RESPONDENT'S BRIEF IN OPPOSITION

FILED
MAY 31 1961
JAMES R. BROWNING, Clerk

No. 934

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANN C. FIELD, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
I. HENRY KUTZ,
SHARON L. KING,
Attorneys,
Department of Justice, Washington 25, D.C.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Court of Appeals rendered no opinion; its judgment (Pet. 27) is reported at 286 F. 2d 960. The opinion of the Tax Court (R. 44a-74a)[1] is reported at 32 T.C. 187.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1960 (Pet. 27), and rehearing was denied on January 31, 1961 (Pet. 27). The petition for a writ of certiorari was filed on April 29, 1961.

[1] Documents filed in the Court of Appeals will be referred to as follows: "R"—the appendix to the petitioners' brief; "Br."—the petitioners' opening brief; "Supp. R."—Appendix B to the respondent's brief. These documents are included in the record filed by petitioners.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the assessment of transferee liability upon the shareholders of a dissolved corporation was made within the period of limitations provided by the Internal Revenue Code of 1939.

2. Whether the Tax Court abused its discretion in refusing to reopen the case to consider the contention that petitioners were not liable as transferees, after it had already decided the case upon the basis of petitioners' concession that they were liable as transferees and were raising only the question whether such liability was timely assessed.

3. Whether the Tax Court properly dismissed, as an untimely attempt to raise new issues, a motion to vacate the decision and grant an additional hearing, which was made almost a year after the decision of the Tax Court and seven months after the petition to review was filed in the Court of Appeals.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Internal Revenue Code of 1939, of the Treasury Regulations, and of the Michigan Corporation Law are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

These consolidated cases involve the transferee liability of petitioners, former stockholders of the Adwood Corporation ("Adwood"), for the latter's income taxes. The facts as found by the Tax Court

(R. 47a–59a), some of which are stipulated (R. 20a–42a), are as follows:

On December 1, 1950, and March 2, 1951, thirty-day letters were sent to Adwood proposing that deficiencies be assessed in its taxes for the taxable years ended May 31, 1945, through May 31, 1950. These deficiencies were based on proposed adjustments in the depreciation of the Hotel Detroiter, the principal property owned by Adwood. (R. 20a–21a, 48a, 50a–51a.) On December 13, 1950, and March 15, 1951, Adwood filed with the District Director, in accordance with the terms of the thirty-day letters, protests to the proposed adjustments. It stated that a case involving similar proposed adjustments for the years immediately preceding 1945 was before the Court of Appeals for the Sixth Circuit, and that if Adwood were unsuccessful in that appeal, the proposed adjustments in this case were proper. Adwood requested that its proposed tax liability "be held in abeyance until such time as the decision of the Court of Appeals for the Sixth Circuit was rendered"; and it stated that it was willing to sign any required waivers of the statutory limitation period for these years. (R. 21a, 50a–51a.)

On March 27, 1951, the stockholders of Adwood[2] adopted a resolution to dissolve the corporation and distribute all of the corporate assets to the stockholders. A notice of adoption of such resolution was

[2] As of March, 1951, there were 104,281 shares of stock in Adwood outstanding, of which 101,475 shares were held by the six petitioners herein and 2,806 shares were held by seven other persons. (R. 23a, 48a.)

filed with the Commissioner of Internal Revenue and a certificate of dissolution was filed with the Michigan Corporation and Securities Commission. (R. 23a, 47a.)

On April 28, 1951, pursuant to a plan of liquidation, Adwood distributed its assets to its stockholders. These distributions were made without consideration and left Adwood insolvent and without assets with which to pay any part of its liability for federal income, declared value excess profits, and excess profits taxes for the year 1945 through 1950, plus interest. (R. 24a, 48a–49a, 50a.)

Adwood and the Commissioner executed successive consents (Treasury Department Form 872) extending the time for assessment of the additional tax liability of Adwood for the years 1945 through 1950. The last consents were executed on November 5, 1952, and extended the date for assessment to June 30, 1954. All of the agreements bore Adwood's seal and were executed and delivered by authorized agents of the corporation with the authorization of its board of directors, all of whom are petitioners herein. (R. 56a–57a.)

On December 23, 1952, the Court of Appeals for the Sixth Circuit affirmed the Tax Court's decision sustaining the Commissioner in adjusting the basis for depreciation of the Hotel Detroit for the years immediately preceding the years at issue here (200 F. 2d 552), and on October 12, 1953, this Court denied certiorari (346 U.S. 818). (R. 51a.)

On October 23, 1953, waivers of restrictions on assessment and collection for the taxable years here

involved were executed on behalf of Adwood by petitioner Irving Bilton and filed with the District Director. The latter gave notice to Adwood of the assessment of the tax liability and demanded payment on December 11, 1953 and on January 20, 1954, but payment was neglected or refused. (R. 51a, 52a.)

On January 13, 1954, Adwood filed with the District Director an offer in compromise on the basis of inability to pay the tax liability. The offer contained a waiver of benefit of any statute of limitations applicable to the assessment and/or collection of liability sought to be compromised and an agreement to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which the offer was pending and for one year thereafter. A check in the amount of $50,295.29 was submitted with the offer on the understanding that it was to be held in a suspense account. On August 19, 1954, Adwood filed an amended offer in compromise with the District Director (R. 33a, 34a, 57a–58a; Br., 25; Supp. R. 7b.) The offers were withdrawn after the Tax Court entered its decisions, in order to have the Commissioner apply the amount tendered to the satisfaction of the petitioners' liability as transferees. (Br. 25.)

On June 23, 1955, statutory notices of deficiency were mailed to all of the petitioners (except Ethel Daniels) as transferees of Adwood and on December 5, 1955, a statutory notice of deficiency was mailed to Ethel Daniels (the widow of an Adwood stockholder) as a transferee of a transferee. Each of these notices of deficiency asserted transferee liability for the tax

liability of Adwood for the taxable years 1945 through 1950, plus interest as provided by law. (R. 47a, 58a.)

The Tax Court held (R. 58a–59a) that the successive consents extending the period for assessment of Adwood's tax liability to June 30, 1954 were valid; and that the assessment of transferee liability, made on June 23, 1955 for all but one of the transferees, satisfied the requirement in Section 311(b) of the Internal Revenue Code of 1939 (*infra*, p. 14) that transferee liability be assessed against an initial transferee "within one year after the expiration of the period of limitation for assessment against the taxpayer."[3] The court rejected the petitioners' contention that Section 21.75 of the Michigan Corporation law (*infra*, p. 18), which provides for the continuation of a dissolved corporation for three years for certain purposes, barred the assessment of any transferee liability after April 27, 1954 (three years after Adwood's dissolution) (R. 64a–73a). The court pointed out (R. 67a–69a) that the Michigan statute contains a proviso that with respect to "any action, suit or proceeding begun or commenced by or against the corporation prior to" dissolution and with respect to "any action, suit or proceeding begun or commenced by the corporation" within three years after dissolution, the corporation shall for the purpose of such

[3] The court also held that the assessment of transferee liability upon petitioner Ethel Daniels, the widow of an Adwood stockholder, satisfied the statutory requirement that an assessment upon a transferee of a transferee be made within one year after expiration of the limitation period for assessment against the preceding transferee.

proceedings "be continued a body corporate * * * until any judgments, orders, or decrees therein shall be fully executed." It held (R. 69a–73a) that the issuance to Adwood of thirty-day letters by the Commissioner on December 1, 1950, and March 2, 1951, and the filing of objections thereto by Adwood on December 13, 1950, and March 15, 1951, constituted the commencement of a proceeding by or against Adwood prior to its dissolution; and that the filing by Adwood of an offer in compromise on January 13, 1954, constituted the commencement of a proceeding by Adwood, within the meaning of the foregoing proviso.

The court of appeals affirmed on the findings, opinion and orders of the Tax Court.

ARGUMENT

1. Petitioners contend that although the waivers extending the time for assessment against Adwood to June 30, 1954, were valid, they abated on April 27, 1954—when petitioners assert Adwood's corporate existence terminated under Michigan law—and hence that the notices of transferee liability were not sent within one year after the expiration of the period of limitation for assessment against the transferor as required by Section 311(b)(1) of the 1939 Code, Appendix, *infra*, p. 14. The Court need not reach that issue, however, since the Internal Revenue Code of 1939 authorized assessment against Adwood to be made up to June 30, 1954. In any event, the decisions below rest primarily on state law, on which further review is unwarranted; the interpretation by the

courts below of the Michigan Corporation law is correct; and there is no conflict of decisions.

a. Even assuming *arguendo* that Adwood's corporate existence terminated on April 27, 1954, petitioners' contention that the waivers abated on that date is unsound. It is settled that the United States is not bound by state statutes of limitation unless Congress provides that it shall be. *Phillips* v. *Commissioner*, 283 U.S. 589; *United States* v. *Summerlin*, 310 U.S. 414, 416; *Taylor* v. *United States*, 324 Mass. 639, 88 N. E. 2d 121, 123, certiorari denied, 338 U.S. 948. Congress has not so provided here. On the contrary, Section 311(c) of the 1939 Code, Appendix, *infra*, p. 15, states that, for the purposes of Section 311 (the statute of limitations section applicable here), the period for assessment of tax liability against a taxpayer-corporation which has terminated its existence shall be the period that would be in effect had such termination not occurred. Thus, in the instant case, the period for assessment against Adwood continued to June 30, 1954, the date fixed by the consent executed by Adwood on November 5, 1952, irrespective of when Adwood's corporate existence terminated. The notices of transferee liability, sent to the petitioners within a year of June 30, 1954, were accordingly timely. *Wagner* v. *Commissioner*, decided October 29, 1958 (1958 P–H T.C. Memorandum Decisions, par. 58,112); see also *Bahen & Wright* v. *Commissioner*, 176 F. 2d 538, 540–541 (C.A. 4).

b. In any event, as the lower courts held, Adwood's corporate existence did not terminate under Michigan

law at the end of the three-year winding-up period, but continued beyond that date for purposes of assessing the tax deficiencies here involved. Section 75 of the Michigan General Corporation Act provides that a corporation shall continue as a body corporate with respect to any "proceeding" begun or commenced by or against such corporation prior to dissolution or by such corporation within three years after the date of dissolution until any judgments, orders, or decrees therein shall be fully executed.

In the instant case, formal administrative proceedings for the assessment and collection of additional taxes from Adwood were initiated prior to the dissolution of Adwood and were still in process at the time the three-year winding-up period expired. On December 1, 1950, and March 2, 1951, thirty-day letters were sent to Adwood proposing additional tax liabilities and advising that failure by the taxpayer to make any response within thirty days would result in the issuance of a statutory notice of deficiency, *i.e.* a ninety-day letter. Adwood responded by filing protests on December 13, 1950, and March 15, 1951. It requested that further action be held in abeyance until the same question was resolved by the Court of Appeals for the Sixth Circuit, and stated that it was willing to sign waivers of the statutory limitation for assessment of the tax. Such waivers were executed both before and after dissolution. After the Sixth Circuit held in favor of the Commission, Adwood executed waivers of restrictions on assessment and collection of deficiencies and thereby waived the issuance of a ninety-day letter. Assessments were made

for payment and Adwood responded by submitting an offer in compromise.

c. The courts below held that the foregoing events constituted a "proceeding" under the Michigan statute that continued the existence of Adwood beyond three years after dissolution. There is no merit to petitioners' contention (Pet. 14–17) that these rulings are in conflict with *Bahen & Wright* v. *Commissioner, supra,* and *American Standard Watch Co.* v. *Commissioner,* 229 F. 2d 672 (C.A. 2).[4] Indeed, these cases support the rulings below. For they both rejected the argument that the administrative proceedings, commenced before or during the three-year winding-up period, did not initiate "proceedings" within the meaning of statutes similar to the Michigan statute involved here and accordingly did not extend the life of the respective corporations beyond the three-year winding-up period. The Court in the *Bahen & Wright* case stated (176 F. 2d at 539–540): "We think that these several steps may fairly be regarded as parts of an integral administrative proceeding, and that it cannot be said that the proceeding does

[4] *Wheelers' Peachtree Pharmacy, Inc.* v. *Commissioner,* 35 T.C. 177, upon which the petitioners also rely, has no relevance here. That case held only that the mere filing of consents extending the [illegible] of limitations for the assessment of tax deficiencies did not constitute the commencement of a proceeding under the Georgia dissolution statute. The Tax Court there pointed out (p. 181–183), that, unlike either the instant case or the *Bahen & Wright* and *American Standard Watch Co.* cases, no administrative steps had been taken toward making an assessment until after the three-year winding-up period had expired. In the instant case, however, administrative proceedings for the assessment of a deficiency had been begun during the three-year period.

not begin until the jurisdiction of the Tax Court is invoked."[5]

2. The petitioners conceded in the Tax Court that they were the transferees of the Adwood corporation and that they would be liable for assessments of transferee liability if the assessments were not barred by the statute of limitations. (R. 59a.) On May 25, 1959, almost a year after the trial and after the Tax Court had decided the case, the petitioners sought for the first time to raise the issue (in motions to amend their petitions, R. 74a) that the Commissioner had

[5] The petitioners' attempt to distinguish these cases on the ground that the issuance of thirty-day letters, as opposed to ninety-day letters, is not part of the administrative procedure for assessing and collecting taxes, involves a misconception of the character of the procedures followed by the Internal Revenue Service in assessing and collecting tax deficiencies. As explained by the Treasury Regulations (Statement of Procedural Rules (1954 Code), Section 601.105(d), Appendix, *infra*, p. 16), when an examining agent's report recommending the assertion of a deficiency or additional tax is approved on review in the Internal Revenue Service, the District Director then sends the taxpayer a thirty-day letter. This form letter states that if the taxpayer agrees with the agent's recommendation, he so indicate by executing a waiver or acceptance; that if he disagrees with the recommendation, he may file a protest; and that if he makes no response, a statutory notice of deficiency—a ninety-day letter—will issue at the end of thirty days.

Thus, the thirty-day letter is just as essential an element of the administrative process for the assessment and collection of additional tax liability as the ninety-day letter. In the instant case, if Adwood had not requested, after receipt of the thirty-day letters, that the proposed tax liability "be held in abeyance" until the Sixth Circuit had rendered a decision with respect to the same issue for prior years, a ninety-day letter would have issued; and if Adwood did not then invoke the jurisdiction of the Tax Court for redetermination of the deficiencies, assessment would have been made.

not exhausted his remedies against Adwood because he had not acted on the offer in compromise, and that they could therefore not be held liable as transferees. The Tax Court denied the petitioners' motions on the grounds that they untimely attempted to raise a new issue as to petitioners' liability as transferees on the basis of facts at all times known to petitioners; and that in any event the new issue was without merit since the parties had stipulated (R. 24a) that Adwood was insolvent and without assets to pay any part of its liabilities for federal taxes for the years 1945 through 1950. (Supp. R. 1b–7b.)

The granting or denying of motions that raise new issues subsequent to the determination of a case rests within the sound discretion of the trial court. *O'Rear* v. *Commissioner*, 80 F. 2d 473 (C. A. 6th). We submit that the Court of Appeals correctly held that the Tax Court did not abuse its discretion in denying the motion.

3. Petitioners also contend (Pet. 22–26) that the Tax Court's decisions are erroneous because they do not exclude interest on certain of the deficiencies. Petitioners first raised this alleged error by filing in the Tax Court motions to vacate decisions and reopen hearing under Rule 50 (R. 86a–91a), nearly a year after the decisions of the Tax Court (R. 92a); about ten months after the petitioners had paid the taxes and interest (R. 89a); and more than seven months after they had filed petitions for review in the court of appeals (R. 92a). The Tax Court denied these motions (R. 91a) because they were untimely and because they would raise new issues in a Rule 50 pro-

ceeding, which is specifically prohibited by the rules. (R. 92a–93a.) The Tax Court also noted that it does not have jurisdiction over questions relating to the amount of interest, since interest is not calculated until after the Tax Court's decisions have become final, and it is then fixed not by the Court, but by the Commissioner. *Commissioner* v. *Kilpatrick's Estate*, 140 F. 2d 887, 888–889 (C.A. 6). These rulings of the Tax Court were correct, and the Court of Appeals did not err in sustaining them. The fact that the Tax Court fixes the date from which any interest is to be computed does not mean that it has undertaken to determine the amount of interest to be paid

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
I. HENRY KUTZ,
SHARON L. KING,
Attorneys.

MAY 1961.

APPENDIX

Internal Revenue Code of 1939:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U.S.C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

* * * * *

(b) *Waiver.*—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

(26 U.S.C. 1952 ed., Sec. 276.)

SEC. 311. TRANSFERRED ASSETS.

* * * * *

(b) *Period of Limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the

period of limitation for assessment against the taxpayer;

(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—

except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.

(3) In the case of the liability of a fiduciary,—not later than one year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later;

(4) Where before the expiration of the time prescribed in paragraph (1), (2), or (3), for the assessment of the liability, both the Commissioner and the transferee or fiduciary have consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(c) *Period for Assessment Against Taxpayer.*—For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the

taxpayer shall be the period that would be in effect had death or termination of existence not occurred.

* * * * *

(26 U.S.C. 1952 ed., Sec. 311.)

Treasury Regulations on Statement of Procedural Rules (1954 Code):

SEC. 601.105 EXAMINATION OF RETURNS AND CLAIMS FOR REFUND, CREDIT OR ABATEMENT: DETERMINATION OF CORRECT TAX LIABILITY.—

* * * * *

[As amended, 23 Fed. Register, Part 3, p. 3124]

(d) *Thirty-day letters and protests*—(1) *General.*—The report of the examining agent, as approved after review, recommends one of four determinations:

(i) Acceptance of the return as filed and closing of the case;

(ii) Assertion of a given deficiency or additional tax;

(iii) Allowance of a given overassessment, with or without a claim for refund, credit, or abatement;

(iv) If a claim for refund, credit, or abatement has been filed and has been found wholly lacking in merit, denial of the claim.

If any one of the last three determinations is made (except a full allowance of a claim in respect of any tax), unless the taxpayer has previously agreed with the finding by signing an agreement form as above described in this section, the district director sends to the taxpayer a preliminary or "30-day letter". This is a form letter which states the determination proposed to be made. It is accompanied by a copy of the examining agent's report explaining the basis of the proposed determination. It suggests to the taxpayer that if he concurs in the recommendation, he indicate his agreement by executing and returning the enclosed form of waiver or acceptance. The prelimi-

nary letter also advises the taxpayer that if he disagrees with the proposed determination, he may file a written protest under oath within 30 days (from the date of the letter) stating the grounds for his disagreement and may have a hearing in the Appellate Division of the region if requested, and if that Division has jurisdiction (see § 601.106(a)(3)). Failure by the taxpayer to make any response within 30 days will result in the issuance of a statutory notice of deficiency or other appropriate action, such as the issuance of a notice of adjustment or the denial of a claim in income, profits, estate and gift tax cases, and appropriate adjustment of the tax liability or denial of a claim in excise and employment tax cases.

* * * * *

Michigan General Corporation Act, 15 Michigan Statutes Annotated (1937):

SEC. 21.65. *Dissolution:* * * *

SEC. 21.73. *Same; distribution in kind* [as amended, 1959 Cum. Supp.]. Sec. 73. Any solvent corporation may also be dissolved by the vote or written consent of the holders of at least ¾ of each class of its outstanding stock in the following manner: By the sale of a part or the whole of its assets, the payment of all its debts and liabilities, or making provision for the payment thereof, and the distribution of the residue pro rata among its shareholders, or, after payment of all its debts and liabilities, or making provision for the payment thereof, the remaining assets may be distributed in kind pro rata among its shareholders. If there is more than 1 class of shares, any such distribution shall be in accordance with the preferences thereof, if any. Within 30 days after any such dissolution a certificate signed by the holders of at least ¾ of each class of its outstanding stock shall be filed with the Michigan corporation and securities commission and a duplicant original thereof with

the county clerk where its registered office is located in the manner provided in section 5 for original articles, showing that all the debts and liabilities have been paid or provision for the payment thereof made and the assets have been distributed pro rata among the shareholders or provision for such distribution made.

SEC. 21.75. *Dissolved or defunct corporation, continuation for special purposes.* Sec. 75. All corporations whose charters shall have expired by limitation or dissolution or shall be annulled by forfeiture or in any other way or manner have become void shall nevertheless continue to be bodies corporate for the further term of three [3] years from such expiration, dissolution or forfeiture for the purpose of prosecuting and defending suits for or against them and of enabling them gradually to settle and close their affairs and to dispose of and convey their property and to divide their assets; but not for the purpose of continuing the business for which such corporations were organized: *Provided,* That with respect to any action, suit or proceeding begun or commenced by or against the corporation prior to such expiration, dissolution or forfeiture and with respect to any action, suit or proceeding begun or commenced by the corporation within three [3] years after the date of such expiration, dissolution or forfeiture, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued a body corporate beyond said three [3] year period and until any judgments, orders or decrees therein shall be fully executed: And *provided further,* That whenever the number of directors of such a corporation whose charter has so expired or shall have been forfeited or which is otherwise dissolved shall at or before the beginning of or during said term of three [3] years by death, resignation or otherwise,

be less than the full number of directors required or authorized by statute or by the by-laws of such corporation, then and in that event a majority of the remaining, surviving directors or the sole surviving director, shall from time to time, during said period of three [3] years, have all the powers to act for such corporation under this section which are conferred upon or which exist in the board of directors of such corporation before the expiration of its charter or during said term of three [3] years.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ANN C. FIELD, et al., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY FOR PETITIONERS

DAVID ALTMAN
GERALD W. BROOKS
BURTON W. KANTER
209 S. LaSalle Street,
Chicago 4, Illinois

Counsel for Petitioners

ALTMAN, LEVENFELD & KANTER
209 South La Salle Street
Chicago 4, Illinois

Of Counsel for Petitioners

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REPLY FOR PETITIONERS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cases.

ARGUMENT IN REPLY

I

1. Respondent's Brief in Opposition contains a misleading statement of material fact which has a significant bearing on the final result in these cases.

All the taxes asserted against Adwood (and with respect to which waiver of restrictions on assessment were given) were not assessed on October 23, 1953 or at any time thereafter (Respondent's Brief, p. 4; Petition pgs. 4 and 22). It is because of this circumstance the petitioners as transferees are not liable for interest on the unassessed taxes,

which interest has nevertheless been collected from them under the Tax Court's decisions entered July 25, 1959 (Petition pages 22-23).

Petitioners have sought to correct the said decisions of the Tax Court, but the Tax Court and the Sixth Circuit have denied them their right to be heard. This is a denial of justice which this Court can and should remedy. *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *Helvering* v. *Richter*, 312 U.S. 561 (1941).

2. Respondent would ignore state law, and the rule of this Court in *Commissioner* v. *Stern*, 357 U.S. 39 (1958), in determining whether notices of deficiency were timely issued to petitioners as transferees, arguing that the date of termination of Adwood under state law and the question of whether or not a "proceeding" was commenced under state law are irrelevant. Respondent argues (Respondent's Brief p. 8) that Section 311(c) of the 1939 Code authorizes ignoring the termination of Adwood's corporate existence in determining the period of limitations.

Respondent's argument with respect to the applicability of Section 311(c) ignores the history, intent, and the clear purport of its language to provide against only the lapse of the three-year original period for assessment by reason of corporate dissolution. Any extension of life for assessment beyond this period for federal purposes depends on state law rules and is not covered by the specific federal statute.

Respondent in the courts below has clearly recognized this limited purpose of Section 311(c) but would now ignore his own previously advanced position.

3. The short answer to respondent's contention (Respondent's Brief, p. 8) that the United States is not bound by state statutes of limitations is that the Michigan statute

pertinent in these cases is not a statute of limitation but primarily a declaration of the time limit on corporate existence, and under the rule of the *Stern* case must be looked to to determine the date on which the transferor's existence terminated and thus the date by which timely notices of deficiency must have been sent to the transferees.

4. In the event of failure of its argument on the basis of Section 311(c), the respondent would, as has previously been pointed out by petitioners in their petition for writ of certiorari, treat the 30-day letter as the commencement of a "proceeding" against Adwood within the meaning of the Michigan statute.

Respondent refuses to recognize the direct conflict which exists between the decision of the Sixth Circuit in these cases and the decisions of the Second and Fourth Circuits in *American Standard Watch Co., Inc.* v. *Commissioner*, 229 F. 2d 672 (2d Cir. 1955), and *Bahen and Wright, Inc.* v. *Commissioner*, 176 F. 2d 535 (4th Cir. 1949), and in fact argues that the latter cases support the decision of the Sixth Circuit. Petitioners have previously pointed out the specific facts which clearly demonstrate the conflict. It is important now only to set right respondent's seriously misleading quotation from *Bahen and Wright* (Respondent's Brief p. 10) by quoting in full the statement of the Fourth Circuit which clearly supports petitioner's contention:

> "The issuance of the Commissioner's notice of deficiency under Section 272 of the Internal Revenue Code is the first formal step in the assessment and collection of an additional tax without which payments of the tax cannot be enforced. It suspends the collection of the tax for ninety days and is a necessary preliminary to the petition for review which the taxpayer may file with the Tax Court within that period. If the petition is filed, the Tax Court acquires a jurisdiction and the

collection of the tax remains in abeyance until the court has affirmed, modified or rejected the Commissioner's determination. We think that these several steps may fairly be regarded as parts of an integral administrative proceeding, and that it cannot be said that the proceeding does not begin until the jurisdiction of the Tax Court is invoked. The court merely takes the final administrative step as "an independent agency in the Executive Branch of the Government." Internal Revenue Code §1100; *Goldsmith* v. *United States*, 270 U.S. 117 [1 USTC ¶ 164]; *Lincoln Electric Co.* v. *Commissioner*, 6 Fed. 379 [47-1 USTC ¶ 9282]. But cf. *Anderson* v. *Commissioner*, 7 Cir., 164 Fed. (2d) 874 [48-1 USTC ¶ 9109]. Hence the proceeding in the pending case was begun within three years of the taxpayer's dissolution."

The integral administrative proceeding referred to is that which begins with issuance of the 90-day letter and includes petition to the Tax Court. The decision of the Fourth Circuit is clearly that only the 90-day letter—the only technique provided for by statute to commence a proceeding—is a sufficiently formal step to constitute the commencement of a "proceeding" as the term is used in the statute construed.

5. Respondent's attempt (in footnote 5 on p. 11 of Respondent's Brief) to rely on the administrative procedures which have been outlined for the issuance of the 30-day letter ignores the vital fact that the 30-day letter is not a final determination but merely a proposal, and that only in the event no response is made to that proposal is the 90-day letter automatically issued; in the event response is made the 90-day letter may never be issued. More important still, the administrative procedure for the assessment and collection of taxes is not the statutory procedure which must be followed to commence a proceeding; this procedure is the issuance of a 90-day letter.

6. Further, in its footnote respondent would have us believe because a 90-day letter *might have been issued* in these cases had Adwood not acceded to the 30-day letter proposal, that the 30-day letter should be considered the event which commenced a proceeding. Quite to the contrary, after issuance of the 30-day letter, having acceded at the administrative level to the assessment of the proposed taxes without the issuance of a 90-day letter, if there was a proceeding earlier commenced (which constituted an administrative proceeding) it was terminated upon the act of assessment.

7. The respondent contends the Tax Court does not have jurisdiction over interest (although these are transferee proceedings cf. Section 311(a) I.R.C. 1939) *and yet the Tax Court decisions appealed from specifically include the interest* which is here attacked.

The last sentence of the Brief in Opposition reads:

> "The fact that the Tax Court fixes the date from which any interest is to be computed does not mean that it has undertaken to determine the amount of interest to be paid."

Petitioners submit that this Court should not subscribe to such sophistry.

Respondent's indicating that the Tax Court's fixing of the date from which interest is to be computed is not the same as calculating interest merely begs the basic question which must be resolved; that is, whether the date which was fixed by the Tax Court was the proper date for computing interest. The mathematical computations, of course, need not be made by the Tax Court and can be made by anybody, but the fixing of the legal date from which in-

terest should properly be computed is by respondent's own admission in its brief properly within the scope of Tax Court jurisdiction, and challenge to determination of that date was timely raised and should be considered in this proceeding and not left to separate suit for refund in a federal district court, prolonging and adding to already extended litigation.

8. A study of the record shows that the first motions for reconsideration were timely filed and that in filing the second group of motions with respect to the interest computations the petitioners have proceeded with due diligence.

9. The significant support to petitioners' position found in the recent decision of the Tax Court in *Wheeler's Peachtree Pharmacy, Inc.*, 35 T.C. No. 22 (1960) and outlined in petitioners' original Petition is underlined by the recent acquiescence of the Commissioner in that decision in Internal Revenue Bulletin No. 1961-17, April 24, 1961.

CONCLUSION

For the reasons urged in the petition for writ of certiorari, such writ should be granted.

Respectfully submitted,

DAVID ALTMAN
GERALD W. BROOKS
BURTON W. KANTER
209 S. LaSalle Street
Chicago 4, Illinois

Counsel for Petitioners

ALTMAN, LEVENFELD & KANTER
209 South LaSalle Street
Chicago 4, Illinois

Of Counsel for Petitioners